Communications of the South Central States, Inc. ("AT&T"), and the Competitive Telecommunications Association ("CompTel"). BellSouth has filed a response to those comments. The issue of whether BellSouth's SGAT complies fully with applicable law is ripe for Commission decision.

As an introductory matter, the Commission reiterates that matters relevant to Case No. 96-608, including BellSouth's actual dealings with its competitors and its technical ability to furnish nondiscriminatory access to necessary operating systems, are not at issue here. Accordingly, comments filed by the parties which discuss these issues will not be addressed herein. The sole focus of this proceeding is to determine the legal sufficiency of the SGAT as an adequate vehicle for competitive entry.

The SGAT purports to furnish legally sufficient terms regarding, inter alia, number portability, reciprocal compensation, unbundled access, collocation, rates for interconnection, transport and termination of traffic, unbundled network elements ("UNEs"), and resale of BellSouth services by competitive local exchange carriers ("CLECs"). Commenters dispute the legal sufficiency of several of these provisions. The Commission's findings regarding the relevant issues are as follows.

Operations Support Systems

Section 251(c)(2) requires BellSouth to provide interconnection and access that is at least equal in quality to that provided by BellSouth to itself. Commenters argue that the lack of clearly defined performance measurements in the SGAT render the SGAT provisions in this area inadequate. They also raise a number of issues relating to whether BellSouth can, in practice, provide nondiscriminatory access. However, performance measurements are not, in themselves, required by Section 251.

Moreover, the actual ability of BellSouth to deliver what it promises in its SGAT is not at issue. The SGAT offers electronic interfaces for pre-service ordering, service ordering and provisioning, trouble reporting, and customer usage data, as well as the option of placing orders manually.[2] Current systems will be updated as needed to improve operations, and CLECs choosing the SGAT will be kept informed of updates and given the option to migrate with BellSouth.[3] The provision for updating these systems ensures that CLECs electing to provide service pursuant to the SGAT will be able to receive the benefits of improvements as they are made. The Commission finds no legal infirmity in the terms offered in the SGAT, and finds that performance issues pursuant to those terms are not ripe for decision. Performance measurements may very well be necessary to determine whether BellSouth's performance in actually providing nondiscriminatory access is sufficient to enable it to enter the interLATA market. However, that issue will be addressed in Case No. 96-608.

Resale

The Act prohibits BellSouth from imposing "unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services." Once again, several commenters discuss performance issues rather than contract terms offered in the SGAT. These issues are irrelevant here. AT&T points out that the joint marketing restriction in the SGAT, at Section XIV(E) does not contain a sunset provision stating that the restrictions no longer apply when BellSouth is authorized to provide in-region, interLATA services or on February 8, 1999, whichever is earlier. Such a sunset

[2] SGAT at II.B.5 and 6.

[3] SGAT at II B 6(f).

provision should be included pursuant to applicable law. Otherwise, except as specified elsewhere in this Order, SGAT terms regarding resale appear to be legally sufficient.

Customer Migration Issues

MCI complains that BellSouth inappropriately may require of the CLEC, at BellSouth's discretion, "proof" of authorization to migrate a customer. MCI accurately characterizes the section that contains this provision, XIV.G, as inappropriately vague. Accordingly, BellSouth shall clarify its SGAT to make it clear that BellSouth will not take upon itself the responsibility of determining whether one of its customers has, indeed, elected another local exchange carrier. Fraudulent carrier change orders will be handled by this Commission pursuant to HB 582 (eff. July 15, 1998), to be codified at KRS Chapter 278. The Commission notes that this statute requires the carrier that initiated the change, and not the customer's previous local exchange carrier, to retain proof that the change was actually requested.

MCI also points out that the SGAT charge to a local service provider for initiating an unauthorized carrier change is $19.41, see Section XIV.H, plus the appropriate nonrecurring charge to reestablish the customer's service with his preferred provider. The SGAT does not explain how BellSouth determines whether "slamming" actually has occurred. Moreover, such a finding should be made, in any event, by this Commission rather than by BellSouth. Reestablishing a customer's service with his preferred carrier will involve a cost, and the SGAT's provision passing that cost on to the carrier initiating the change is appropriate. However, there is no reason why BellSouth should collect an additional $19.41 in the absence of adequate cost justification. Alleged slamming violations should be reported to this Commission for resolution.

MCI correctly states that BellSouth should include in its SGAT a provision that a new CLEC customer may choose to migrate his directory listing as-is from BellSouth to his new carrier. BellSouth contends that the CLEC should provide the listing to BellSouth. However, ease of customer migration is crucial to development of local exchange competition, and BellSouth offers no reason why it should not provide "as-is" listings. BellSouth shall reform its SGAT to include such a provision.

Termination of Service and Notification of Network Changes

MCI contends that SGAT Section XIV.R is one-sided in that it contains no dispute resolution clause and only vaguely explains the reasons BellSouth may terminate service to a CLEC. As BellSouth notes, the Commission's complaint process is available pursuant to KRS 278.260. MCI also fears the section is so vague that a CLEC could have its service cut off at any time, even if it believes in good faith it is complying with the parties' agreement and with applicable rules. MCI demands that BellSouth clarify reasons for which it will terminate service and provide timely notification of termination or network changes. BellSouth says that it will provide "reasonable" notice, that the SGAT is sufficiently specific, and that the law requires nothing more. The Commission finds that prior notice of pending termination and network changes, together with available Commission complaint procedures, are sufficient protection for CLECs.

Reciprocal Compensation

Section 252(d)(2) of the Act defines just and reasonable reciprocal compensation to mean a reasonable approximation of the costs of terminating calls that originate on the network of the other carrier. Recovery of these costs must be mutual and

reciprocal. Id. Numerous commenters argue that internet service provider traffic must be explicitly defined in the SGAT as "local" traffic for which reciprocal compensation must be paid. However, the terms of the SGAT, at I(A), adequately define "local traffic" to include telephone calls that originate in one exchange and terminate in the same exchange or in a corresponding extended area service exchange. The issue of whether internet service provider traffic is local is before the Commission in Case No. 98-212[4] and will be decided therein. The terms of the SGAT are silent on this specific issue and, regardless of the Commission's eventual decision in Case No. 98-212, those terms are adequate.

Switched Access and Billing Issues

Commenters argue that terminating access should be at the CLEC's tariffed rate rather than BellSouth's rate if termination is to a CLEC customer; and commenters contend the SGAT must include a provision that CLECs will be provided with access daily usage files to enable them to bill access charges. BellSouth states it will clarify the SGAT to provide that the access daily usage files will be provided. The Commission finds that the proposed clarification should be made. The Commission also finds that terminating access charges should be at the CLEC rate if the call terminates to a CLEC customer. BellSouth shall revise its SGAT accordingly.

[4] Case No. 98-212, American Communications Services of Louisville, Inc., d/b/a e.spire Communications, Inc. and American Communications Services of Lexington, Inc., d/b/a e.spire Communications, Inc. and ALEC, Inc., Complainants v. BellSouth Telecommunications, Inc., Defendant.

Audits

Commenters contend that BellSouth's provision enabling it to perform resale audits of CLECs at its discretion is intrusive. However, BellSouth should be authorized to audit annually the services provided to CLECs to test conformity to the SGAT or its tariff. Other audit provisions are also included in the SGAT. Commenters contend these provisions are discriminatory since no reciprocal provision exists. The Commission agrees. The SGAT shall include reciprocal provisions for audit. Parties may bring disputes to the Commission's attention.

Access to Unbundled Network Elements

The SGAT, at Section II(G)(1), specifies that UNEs may be combined by means of collocation only. Numerous commenters discuss this provision of the SGAT, and correctly point out that the Act, at Section 251(c)(3) requires ILECs to provide nondiscriminatory access to UNEs "at any technically feasible point" and "in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications services," and they object to BellSouth's unwarranted limitation of methods of combination to collocation alone, particularly since the Eighth Circuit Court of Appeals, Iowa Utilities, held that a CLEC is not required to own a portion of a telecommunications network before it may provide service by means of unbundled elements. In addition, the Federal Communications Commission has determined that "nondiscriminatory access " requires an ILEC to provide access that is "at least equal in quality to that which the incumbent LEC provides to itself."[5] The Commission finds that the requirement that a CLEC may combine UNEs only by means of collocation is both discriminatory and unwarranted. The provision violates the Act and must be reformed.

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[5] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, 15658, ¶ 312, vacated in part on other grounds, Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997), cert. granted, ____ S. Ct. ___ (199__).

The commenters also point out that BellSouth's refusal to provide other CLECs with UNE combinations through the SGAT, while allowing AT&T and MCI to obtain them through their negotiated and arbitrated interconnection agreements, is discriminatory and therefore violates the Act. The Commission agrees. BellSouth must provide service to CLECs without discriminating among them.

Commenters also contend that the SGAT method of providing multiple UNEs to competitors violates the Act in that it is anticompetitive and discriminatory, resulting in a failure of BellSouth to provide service to CLECs at parity with service provided to itself. BellSouth, they claim, uses the "recent change" capability in its system to electronically separate and reconfigure UNEs. BellSouth states the "recent change" capability does not reconfigure UNEs, but can only disable and then re-start service. However, when no "reconfiguration" has been requested by a CLEC, there appears to be no reason the "recent change" capability cannot be used to provide UNEs to CLECs. Appropriate, one-time, cost-based compensation may be required by BellSouth for performing this procedure.

The SGAT provides that physical separation of UNEs that were previously combined by BellSouth will occur when they are ordered by a CLEC, even though those elements are currently combined. This provision is unacceptable. Such separation and subsequent recombination would serve no public purpose and would increase costs that ultimately would be passed on to the consumer. Simply put, it is an unnecessary disruption and as several commenters point out, would necessarily result in provision of inferior service to the CLEC's customers. For such an operation to take place, the customer's line must unnecessarily be taken out of service. In addition, the CLEC

would incur entirely unnecessary expense and loss of customer goodwill. While BellSouth may charge a reasonable, non-recurring, cost-based "glue charge" for its expertise in having combined the UNEs, thus receiving some increment above the total cost of the unbundled elements bought by the CLEC, the Commission finds that neither BellSouth nor any other ILEC shall indulge in the wasteful habit of physically separating UNEs for no other apparent reason than to disrupt migration of a customer to the services of another carrier.

BellSouth contends that the Eighth Circuit Court of Appeals in Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997), cert. granted sub nom AT&T Corp. v. _____, ___ S. Ct. ___ (199___) determined that ILECs are not required by the Act to "combine" UNEs for CLECs. It also states that this Commission has never ordered it to "do the combining of UNEs" [BellSouth Response at 40]. Technically, BellSouth is correct. As the Eighth Circuit Court of Appeals noted, "the Act does not require the incumbent LECs to do all of the work." Id. at 813 (emphasis supplied). But failure to order BellSouth to "combine" UNEs at a CLEC's demand is a far cry from stating that BellSouth may deliberately *disconnect* UNEs that are already combined. To clarify: this Commission has not, and does not, order BellSouth affirmatively to combine UNEs for a CLEC. It does, however, order BellSouth to refrain from unnecessarily dismantling its network when elements of that network that are already combined have been ordered in that same combination by a CLEC. Even if the Act permits such anticompetitive conduct, this Commission has the authority, indeed the duty, pursuant to state law to forbid it. See, e.g., KRS 278.280 (enabling the Commission to determine the "just" and "reasonable . . . practices . . . to be observed, furnished, constructed, enforced or

employed" by a utility and to "fix the same by its order, rule or regulation"); KRS 278.512 (enabling the Commission to regulate telecommunications competition in Kentucky in the public interest) 47 U.S.C., § 252(f)(2)(a state commission in reviewing the SGAT may establish or enforce state law, including service quality standards).

UNE Prices

Commenters argue that UNE rates in the SGAT are not properly set and do not comply with the Act. However, as this Commission previously has stated, the rates it has set comply with the Act, and UNE ratesetting is clearly jurisdictional to state commissions. 47 U.S.C. 252; Iowa Utilities. Accordingly, since the SGAT rates are based upon Commission determinations and upon other standards deemed appropriate by this Commission, they are in compliance with law.

Conclusion

The Commission finds that, absent the amendments prescribed in this Order, the SGAT does not conform to applicable law. However, BellSouth may submit a reformed SGAT in accordance with this Order. If such a reformed SGAT is submitted, it shall be reviewed for compliance with the requirements stated herein and, if found to be in compliance, it shall be approved.

The Commission having considered BellSouth's SGAT and comments thereto, and having been otherwise sufficiently advised, HEREBY ORDERS that, absent the amendments prescribed herein, the SGAT shall not be approved. However, if BellSouth submits a revised SGAT which is in accordance with this Order, it shall be approved.

Done at Frankfort, Kentucky, this 21st day of August, 1998.

By the Commission

ATTEST:

Executive Director

STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: AT&T COMMUNICATIONS OF THE MIDWEST, INC., AND U S WEST COMMUNICATIONS, INC.	DOCKET NO. AIA-96-1 (ARB-96-1) (CONSOLIDATED LIMITED REMAND PROCEEDINGS)
IN RE: MCIMETRO ACCESS TRANSMISSION SERVICES, INC., AND U S WEST COMMUNICATIONS, INC.	DOCKET NO. AIA-96-2 (ARB-96-2) (CONSOLIDATED LIMITED REMAND PROCEEDINGS)

FINAL ARBITRATION DECISION ON REMAND, ORDER DENYING MOTION TO FILE REBUTTAL TESTIMONY, GRANTING MOTION TO STRIKE, AND DENYING MOTION FOR SANCTIONS

(Issued May 15, 1998)

SYNOPSIS[1]

On January 14, 1998, at the request of the Board, the U. S. District Court remanded the Board-arbitrated interconnection agreements between U S West and AT&T and U S West and MCI. The remand was necessary because the Eighth Circuit Court changed the applicable law when it vacated FCC rules requiring combinations of network elements and superior quality service from incumbents to competitors. The parties proposed changes to over 600 provisions in the agreements. The Board reviewed each of those proposed changes and made significant modifications to the agreement.

[1]The purpose of this synopsis is to provide readers a brief summary of the decision. While the synopsis reflects the order, it shall not be considered to limit, define, amend, or otherwise affect in any manner the body of the order including the findings of fact and conclusions of law.

A partial list of the decisions made by the Board as arbitrator follows:

1. With regard to service quality, the Board concludes that the difference between the "equal to" standard applicable to interconnection and the "nondiscriminatory" standard applicable to access to network elements is limited to the incumbent's being allowed to provide network elements in an uncombined form;

2. In determining the modifications to the U S West's network that are necessary to accommodate interconnection and access to network elements, a liberal definition of "necessary" shall be used;

3. U S West's SPOT frame proposal to allow competitors to recombine network elements is rejected;

4. U S West is required to provide shared transport;

5. Interconnection and network elements must be provided consistent with national standards as they currently exist and as they evolve;

6. Access to operational support systems shall be via a real-time, mediated access electronic interface; and

7. In general, billing information shall be provided in an EDI 811 format until a national standard is adopted.

The modifications are effective upon issuance of the order and the agreement will be returned to the U. S. District Court to complete its review.

APPEARANCES

DAVID S. SATHER and VINCE DEGARLAIS, 925 High Street, 9 S 9, Des Moines, Iowa 50309; and JOHN M. DEVANEY, Perkins Coie, 607 Fourteenth Street, N.W., Washington, D.C., 20005-2011, appearing on behalf of U S. West Communications, Inc.

MARY B. TRIBBY, Room 1575, 1875 Lawrence Street, Denver, Colorado 80202; and RICHARD W. LOZIER, JR., Belin, Lamson, McCormick, Zumbach & Flynn, P.C., 2000 Financial Center, Des Moines, Iowa 50309, appearing on behalf of AT&T Communications of the Midwest, Inc.

BRET DUBLINSKE, Dickinson, Mackaman, Tyler & Hagen, P.C., Suite 1600, 699 Walnut Street, Des Moines, Iowa 50309, appearing on behalf of MCIMetro Access Telecommunications Services, Inc.

ALICE J. HYDE and KARA K. GIBNEY, 350 Maple Street, Des Moines, Iowa 50319, appearing on behalf of the Iowa Department of Justice, Office of the Consumer Advocate.

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PROCEDURAL BACKGROUND

On January 14, 1998, the United States District Court for the Southern District of Iowa issued its "Ruling Granting the Board and Board Members' Motion for a Limited Remand, and Order" in U S West v. Thoms, et al., Civil No. 4-97-CV-70082. The Court agreed with the Utilities Board (Board) that the decision in Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997), as amended on rehearing on October 14, 1997, changed the law applicable to the interconnection agreements approved by the Board in Docket Nos. AIA-96-1 and AIA-96-2. The Court ordered a limited remand for the Board to apply the standards established in Iowa Utilities Board, as well as other applicable federal and state law standards, to the two interconnection agreements, which remain in effect during the pendency of the remand proceedings. With regard to identification of the specific agreement provisions to be remanded, the Court chose not to rule, directing the Board to "review the agreements, conduct any appropriate proceedings, and make any appropriate modifications." Pursuant to the Court's ruling, modifications to the agreements become effective upon the issuance of this final order on remand. The Court directed that the Board's final order must issue on or before May 15, 1998.

The Board established a remand procedure allowing the parties to identify the specific agreement provisions they believed to be affected by the Eighth Circuit Court decisions. The parties filed initial, responsive, and reply testimony and exhibits. Included with the filings of U S West Communications, Inc. (U S West),

AT&T Communications of the Midwest, Inc. (AT&T), and MCIMetro Access Transmission Services, Inc. (MCI), were matrices showing proposed changes to specific provisions of the agreements and listing the part of the Eighth Circuit Court's decisions cited for each change. AT&T filed a brief with its initial filing. In addition, prehearing briefs were filed by MCI and U S West.

A hearing was held from March 31 through April 7, 1998. The hearing consisted of two parts. First, the Board moderated interactive discussions by panels of expert witnesses on the subjects of combinations of network elements and superior service requirements, including the subtopic of access to operational support systems (OSS). This was followed by cross-examination of the witnesses who filed written testimony.

Initial briefs were filed by U S West, the Consumer Advocate Division of the Department of Justice (Consumer Advocate), and a joint brief by AT&T and MCI on April 17, 1998. Reply briefs were filed on April 24, 1998. In addition, MCI filed a statement regarding the U S West and AT&T matrices in which it indicated that some items of agreement between U S West and AT&T, not joined by MCI, may reflect non-Iowa negotiations to which MCI was not a party. Consumer Advocate participated in the cross-examination at hearing and filed briefs, but did not propose amendments to the agreements, file testimony, nor provide a participant in the panels.

In requesting this remand, the Board argued to the federal district court that the rates set in the initial arbitration were under consideration in a state law proceeding identified as Docket No. RPU-96-9 and, therefore, should not be considered in the remand. The remand has not included any rate issues. At the time of issuance of this decision, compliance tariffs have not been approved in the interconnection rate docket. However, a final order that will provide superseding rates was issued by the Board on April 23, 1998.

The agreements approved in Docket Nos. AIA-96-1 (U S West/AT&T) and AIA-96-2 (U S West/MCI) were identical. There will be a single final order in this remand and a single interconnection agreement attached. However, it is the Board's intention that AT&T and MCI each have a separate agreement with U S West. In the future, consistent with applicable law, either can modify its interconnection agreement through mutual agreement with U S West.

The District Court's remand order left the agreements in effect and made the Board's modifications effective upon the issuance of this order. The agreement language has been modified to reflect that ruling by the Court. The parties will not execute the agreement a second time.

In addition, MCI and AT&T have not yet purchased the interconnection, network elements, and services offered in the agreement to any significant extent. The Board does not believe that Congress intended the negotiation, arbitration, agreement review by the state commission, and court review provided in 47 U.S.C.

§ 252 to be purely academic exercises. For this arduous process to bear fruit, the agreement must have a term of reasonable length when the parties take under the agreement. For that reason, the Board has modified the term to expire on May 15, 2001.

On April 24, 1998, U S West filed a motion to file rebuttal evidence responding to AT&T and MCI allegations that U S West has not provided them with information regarding U S West's technical standards. MCI and AT&T filed resistances, motions to strike, and motions for sanctions on April 27 and 28, 1998. U S West resisted these motions on May 4, 1998.

ISSUES IDENTIFIED BY THE PARTIES

Most of the changes to the interconnection agreements proposed by U S West in this remand relate to a small number of general categories of issues. These include:

- removal of all requirements in the interconnection agreements for U S West to combine network elements;
- removal of all requirements for U S West to provide superior quality interconnection or access to unbundled network elements (UNEs);
- removal of requirements that U S West adopt business practices and procedures preferred by AT&T and MCI; and

- removal of technical requirements that U S West modify its network, when the modifications are not necessary for interconnection or access to unbundled elements.

Closely related to these broad categories of issues, U S West identified subissues relating to its single point of termination (SPOT) frame proposals, provision of shared transport, trunk forecasting, service quality standards and performance measures, performance credits, OSS, and billing format. In addition, U S West identified issues relating to dark fiber and vertical features as UNEs, the bona fide request process as it relates to technical feasibility, payment of construction costs, and the most favored nation provision.

MCI argued throughout the remand proceeding that only minimal changes to the agreements were necessitated by the Eighth Circuit Court's decisions. It proposed that express requirements that U S West provide superior services could be changed to the "at least equal" language of the Telecommuncations Act of 1996 (Act). With regard to combinations of UNEs, MCI proposed no changes. Instead, MCI urged the Board to join numerous other state commissions in finding state law grounds for reaching an outcome different from the Eighth Circuit Court's holdings vacating FCC rules that would have required ILECs to provide combinations of network elements.

In general, the matrices filed in the case show that AT&T has accepted more modifications to the agreements than MCI. However, the positions of AT&T and MCI

were sufficiently similar to allow them to file a joint post hearing brief. They argued that:

- Iowa law requires U S West to provide combinations of UNEs;
- state and federal law require shared transport;
- U S West has failed to prove any provisions in the agreements require superior service;
- many of U S West's proposals would create inferior access and service for competitive local exchange carriers (CLECs);
- U S West has a duty to provide dark fiber; and
- vertical features must be provided and priced as part of the switching element.

In addition to the general issues identified by the parties for the Board to determine, the matrices show more than 600 specific provisions in the agreements identified by the parties for changes. The bulk of these changes were proposed by U S West. AT&T, and to a lesser extent MCI, have agreed to some of these changes. Consistent with the expressed preference of the Act, the district court, and the Board for reaching mutual agreement regarding interconnection issues, the Board appreciates the efforts that led to these mutually acceptable changes.

The Board has reviewed the proposed changes to the agreements settled by AT&T and U S West, but not joined by MCI. The Board believes the provisions acceptable to AT&T and U S West are appropriate under state and federal law.

They are just, reasonable, and nondiscriminatory. The Board further believes the provisions settled by AT&T and U S West should be adopted in agreements applicable to both AT&T and MCI. The record in this proceeding does not provide sufficient evidence of differentiation between the competitive needs of AT&T and MCI to support different agreements. As discussed above, attached to this order is a single agreement that provides a starting point for both AT&T and MCI. However, in the future AT&T and MCI may individually reach agreements with U S West that, consistent with applicable law, would cause the agreements to diverge.

ANALYSIS AND CONCLUSIONS OF LAW ON COMBINATIONS AND SUPERIOR SERVICE

1. Combinations of Unbundled Network Elements

The Board continued to resist a federal district court remand after the initial decision in Iowa Utilities Board v. FCC It was only after the Eighth Circuit Court's rehearing decision vacating a Federal Communications Commission (FCC) rule forbidding incumbent local exchange carriers (ILECs) from separating UNEs that are already combined, that the Board concluded the law had changed sufficiently to warrant a remand of the agreements. The Board recognized the importance of the Court's combinations holding and, in turn, the issues surrounding combinations of network elements have been a primary focus of these proceedings.

During this remand, AT&T and MCI have argued that state law provides sufficient support for provisions in the agreements requiring combinations of UNEs.

Although that approach is attractively procompetitive, the Board cannot agree because of the reasoning of the Eighth Circuit Court in its rehearing order. The Court stated:

> Section 251(c)(3) requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to a combined) basis. Stated another way, § 251 (c)(3) does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements) in order to offer competitive telecommunications services. To permit such an acquisition of already combined elements at cost based rates for unbundled access would obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements on the one hand and the purchase at wholesale rates of and incumbent's telecommunications retail services for resale on the other....

(emphasis supplied), 120 F.3d at 813. Since passage of the Act in February of 1996, the Board has applied state law in the area of local exchange competition in ways that are consistent with the Act. While 47 U.S.C. § 252(e)(3) allows the Board to enforce "other requirements of state law" in its review of interconnection agreements, it is unclear whether that subsection is broad enough to authorize application of state law requirements that would "obliterate" an important part of the regulatory scheme in § 251. The rehearing order is a powerful statement by the Court that arbitrated agreements applying § 251 cannot force an ILEC to provide ILEC-combined UNEs, because to do so eliminates the UNE/resale distinction.

The Board's decision on combinations of UNEs might be more difficult if state law contained an explicit obligation for ILECs to provide combinations. IOWA CODE §§ 476.100 and 476.101 require ILECs to provide nondiscriminatory access to "unbundled essential facilities." Unbundled essential facilities are very similar to UNEs under the Act. However, beyond the nondiscrimination requirements, the Iowa statutes are silent on the issue of combinations. In the face of the Eighth Circuit Court's holdings, the Iowa statute does not provide a sufficient basis for requiring ILECs to offer CLECs combinations of UNEs.

However, the Eighth Circuit Court's decision did not and could not read nondiscrimination out of 47 U.S.C. § 251(c)(3). The Board's decision on combinations of UNEs will respect the Eight Circuit Court's holding, but it will also give full weight to the requirements in both state and federal law that access to UNEs must be on a nondiscriminatory basis. IOWA CODE § 476.100 provides in part:

> A local exchange carrier shall not do any of the following:
>
> 1...
>
> 2. Discriminate against another provider of communications services by refusing or delaying access to essential facilities on terms and conditions no less favorable than those the local exchange carrier provides to itself and its affiliates...
>
> 3. Degrade the quality of access or service provided to another provider of communications services.

The Board concludes this language, when read in conjunction with the Eighth Circuit Court's holding on combinations, establishes the following two-part principle: (1) the ILEC cannot be required to provide combined UNEs; but (2) any uncombined UNEs must be offered on terms and conditions that are, as near as possible given the fact they are uncombined, no less favorable than the ILEC provides to itself or any other party. That principle is consistent with the procompetitive policy goals of state and federal law.

In its analysis of this matter, U S West draws a distinction between the "at least equal in quality to that provided by the local exchange carrier to itself..." standard in the interconnection section, 47 U.S.C. § 251(c)(2), and the "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory..." standard in 47 U.S.C. § 251(c)(3). The Board's conclusion in the preceding paragraph identifies the difference between these standards in light of the Eighth Circuit Court's combinations holding. The difference is that while the ILEC provides itself access on a combined basis to the facilities and functionalities that would be UNEs if purchased by a CLEC, the ILEC is only required to provide CLECs with access to UNEs on an uncombined basis, which is obviously not equal to what the ILEC provides to itself. Beyond that difference, the ILEC must provide access to UNEs equal in quality to the access it provides itself or any other party. If the ILEC is allowed to discourage purchase of UNEs by policies more onerous than

forcing the CLEC to recombine UNEs, the ILEC will have an effective tool to eliminate one method of competitive entry--CLEC purchase of UNEs. Congress intended purchase of UNEs to be one of the available methods for entry into the local exchange market. 120 F.3d at 811.

Another perspective concerning the appropriate analysis of the combinations issue is provided by the Eighth Circuit Court's reasoning in support of its holding. The Court stated:

> The FCC and its supporting intervenors argue that because the incumbent LECs maintain control over their networks it is necessary to force them to combine the network elements, and they believe that the incumbent LECs would prefer to do the combining themselves to prevent the competing carriers from interfering with their networks. Despite the Commission's arguments, the plain meaning of the Act indicates that the requesting carriers will combine the unbundled elements themselves; the Act does not require the incumbent LECs to do all of the work. Moreover, the fact that the incumbent LECs object to this rule indicates to us that they would rather allow entrants access to their networks than have to rebundle the unbundled elements for them.

(emphasis in original), 120 F.3d at 813. This statement shows the Court's understanding that if the ILEC requires the CLECs to recombine network elements, the ILEC must provide entrants access to ILEC networks to allow CLECs to recombine. This area is complicated by the need for network security, which all LECs and regulators must take seriously. The Board's decisions on recombining UNEs will take into consideration the Court's recognition of CLEC access to the ILEC network and the interests of all the parties and the public in network security.